STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2002
v	No. 227195 Oakland Circuit Court
DAVID WILLIAM TORODE, Defendant-Appellant.	LC No. 98-159717-FH

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant David Torode appeals as of right his jury trial convictions of possession with intent to deliver five kilograms or more but less than forty-five kilograms of marijuana,[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Torode to six months' imprisonment for the drug offense and a consecutive two-year prison sentence for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

A. Torode's Arrest

In mid-March 1998, the Narcotics Enforcement Team, a canine officer from the Michigan State Police Department, and two marked units from the Waterford Township Police Department executed a search warrant at 7700 Austere Street in Waterford Township. Although the details of the search and Torode's subsequent arrest were the subject of some dispute at trial, the basic facts are reasonably straightforward. Torode testified at trial that he had been sleeping upstairs in his bedroom when his wife, who had been sleeping on the pullout couch, came and told him that someone was "beating on the front door." Torode opened his briefcase, removed his gun, and walked down the hall to the front door. According to Torode, he looked out of the blinds, saw policemen, and then said in a loud voice, "Just a minute. I'm opening the door." Torode then set down his gun, and started to move a La-Z-Boy chair away from the front door, but was knocked over when the police officers came in the door.

[1] MCL 333.7401(2)(d)(ii).

[2] MCL 750.227b.

Detective Rice and Deputy Spencer testified at trial that when they entered the house, there was a strong odor of marijuana. Detective Rice found a shotgun in the bedroom of the house, and three triple beam scales in the computer room. Deputy Spencer followed the strong marijuana smell to the laundry room where he found a large, blue duffel bag filled with baggies of marijuana. He then followed another strong odor of marijuana into the kitchen and found a briefcase full of marijuana. Deputy Spencer then indicated to Detective Rice, the collecting officer, that he should look in the laundry room and the kitchen. In the kitchen Detective Rice found the briefcase that contained the baggies of marijuana. $1,800 in United States currency was on the kitchen counter. Detective Rice also found the blue duffel bag in the dryer in the laundry room containing the baggies of marijuana. Inside the dryer next to the duffel bag was a brown paper grocery bag containing baggies of marijuana. On a shelf above the dryer was a box of plastic baggies. These baggies were consistent with the baggies used to package the marijuana found in the duffel bag and the grocery bag. Detective Rice also found a briefcase in a closet that contained baggies. The police then arrested Torode.

B. Torode's Interrogation

After the arrest, Deputy Miles took Torode into the bathroom of the house for an interview. Deputy Miles later testified he read Torode his *Miranda*[3] rights at this time and that Torode told him that if there was marijuana in his house it was because the officers had planted it there. The police later escorted Torode to a patrol car and took him to the Oakland County Jail.

Two days later, Detective Rice, Deputy Miles, and Officer Giroux transported Torode from the Oakland County Jail to the 54th District Court in Waterford for his arraignment. According to the officers, during the ride, Torode asked what charges were being filed against him. The officers reportedly told Torode that he was being charged with possession with intent to deliver marijuana and felony-firearm. Torode replied that he took a gun to the door only because he was unsure who was knocking.

After the arraignment, Torode posted bond and was told that he was free to leave. Subsequently, Torode told Detective Rice that he did not want to go to jail and asked Detective Rice if they could go somewhere private to talk about the charges against him. Torode and Detective Rice went to the holding cell area in the back of the court, and, according to Detective Rice, he explained to Torode that he was free to leave, he was not under arrest, and if he wanted to give any information it was of his own free will. Detective Rice testified that Torode then told him that he had been fronted[4] the marijuana found in his apartment and that it cost him approximately $39,000. Further, Detective Rice said, Torode told him that he owed his distributor approximately $100,000.

Torode, however, told a far different story. He stated that when he was taken from the jail to the Waterford District Court, the officers transporting him told him that if he would cooperate, then they would offer him leniency. Torode also testified during the evidentiary hearing before the trial court that while at the Waterford District Court the police officers

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[3] *Miranda v Arizona*, 384, US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] "Fronting" marijuana is basically loaning the marijuana. After the dealer gets paid, then he pays the supplier the money he owes.

threatened him that he better cooperate because he was facing nine years' imprisonment. Torode further denied ever telling the police that he owed someone $100,000, that he had been fronted $39,000 worth of marijuana and that he paid his supplier $2,100 per pound. Torode stated that he repeatedly told the officers that he wanted a lawyer, which was ignored, and that the officers only asked him from whom he had gotten the marijuana.

C. The Suppression Hearing

Before trial, Torode moved to suppress statements and physical evidence and dismiss the charges against him on three grounds. First, he argued that the charges should be dismissed due to entrapment because he knew the informant, one McCalla, and the police took advantage of his need for pain medication in exchange for marijuana. Second, he argued that his statements to the police should be suppressed as involuntary because he was promised leniency. Third, he argued that the felony-firearm charge should be dismissed as contrary to his constitutional right to bear arms.

Following an evidentiary hearing, the trial court denied Torode's motion to suppress and dismiss. The trial court found that no entrapment occurred because the police merely allowed a course of conduct to continue to obtain evidence of the crime. The trial court found that, under the totality of the circumstances, Torode's statements to the police were voluntary. Additionally, the trial court found that the felony-firearm charge should not be dismissed because the right to bear arms does not encompass the possession of a firearm during the commission of a felony.

D. Torode's Defense At Trial

During trial, Torode testified that he had different types of marijuana in his home that he used for medicinal purposes. Torode said that he used an indican brown type strain for abdominal problems, and a lighter green type of "skunk" bud for migraine and neck conditions and spastic spasms in his side. Torode claimed that a friend gave him all the marijuana in the blue duffel bag as a return favor for getting the friend job building a mansion on Pine Lake Road. Moreover, Torode testified that he did not have the intent to sell the marijuana, but he did exchange some with his business partner for some pain medications because he had previously lost his medical insurance. The jury evidently did not agree that Torode's conduct was lawful, convicting him of possession with intent to deliver five kilograms or more but less than forty-five kilograms of marijuana and felony-firearm.

II. Entrapment

A. Standard Of Review

Torode argues that the trial court erred in denying his motion to suppress evidence seized with a search warrant. He claims, essentially, that McCalla entrapped him, contrary to the trial court's findings. This Court reviews a trial court's findings following an entrapment hearing under a clearly erroneous review standard.[5]

[5] See *People v McGee*, 247 Mich App 325, 344; 636 NW2d 531 (2001).

B. Police Conduct

Torode claims that the police engaged in entrapment because he had known McCalla for eleven years and the police traded on McCalla's friendship with him to institute the criminal activity of exchanging marijuana for painkillers. "Entrapment occurs when (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court."[6] However, the police do not entrap a defendant merely by presenting him with an opportunity to commit the crime of which he was convicted.[7]

In analyzing the first prong of the test, the factors to determine whether the government activity would induce criminal conduct include "whether there existed any appeals to the defendant's sympathy as a friend, whether the defendant had been known to commit the crime with which he was charged, and whether there were any long time lapses between the investigation and the arrest."[8] Although Torode did know McCalla, there was never any indication at the evidentiary hearing that Torode only traded the marijuana for pain pills because McCalla had appealed to Torode's sympathy as a friend. On the contrary, Torode's defense was that *he* needed the pain pills because he had numerous health problems. If sympathy had played a role in this transaction, it would have been McCalla's sympathy for Torode. Further, Torode testified at the evidentiary hearing that McCalla never asked him to get the seventeen pounds of marijuana to trade for pain pills. Thus, the argument that the police abused a friendship, resulting in Torode having to trade his marijuana for pain pills, lacks merit.

Moreover, the trial court also correctly found that Torode had the propensity to commit the crime. No entrapment exists if "a defendant is only given the opportunity to commit a crime, or is given aid in furthering an already committed conspiracy so that the government can acquire evidence of that crime . . . ."[9] Even if he was addicted to drugs, addiction is not a lawful excuse for crimes committed in its furtherance.[10] Nor is there any evidence that the trial court's findings were clearly erroneous because of the time between the investigation and Torode's arrest.

Additionally, the trial court correctly held that the police did not engage in reprehensible conduct, which would have occurred "if the furnishing of the opportunity for a target to commit an offense 'require[d] the police to commit certain criminal, dangerous, or immoral acts.'"[11] Here, the charge was limited to the seventeen pounds of marijuana found in Torode's house, not the actual distribution to McCalla. Thus, the factual basis for the charge avoids the circumstances that Torode claims constituted entrapment. We can see no clear error in the trial court's findings, much less that entrapment occurred.

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[6] *Id*. at 344-345.

[7] *Id*. at 345.

[8] *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991), citing *People v Turner*, 390 Mich 7, 22-23; 210 NW2d 336 (1973).

[9] *Juillet, supra* at 52-53.

[10] *Id*. at 63.

[11] *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998), quoting *People v Jamieson*, 436 Mich 61, 95-96; 461 NW2d 884 (1990) (Cavanagh, J., concurring).

III. Torode's Statements

A. Standard Of Review

Torode argues that the trial court erred in refusing to suppress his statements to the police, which he claims were involuntary. "A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous."[12] We review de novo a trial court's conclusion of law following a suppression hearing.[13]

B. Voluntariness

Torode contends that his statements were involuntary because the police told him that they would give him a lenient sentence if he cooperated with the police and threatened him with a lengthy prison term. "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired."[14]

Torode testified during the evidentiary hearing that, when the police took him from jail to the Waterford District Court, the officers transporting him told him that they would offer him leniency if he cooperate. He added that, while at the Waterford District Court, the police officers threatened him that he should cooperate because he was facing nine years' imprisonment. Torode denied ever telling the police that he owed someone $100,000, that he had been fronted $39,000 worth of marijuana, and that he paid his supplier $2,100 per pound. Torode stated that he repeatedly told the officers that he wanted a lawyer, the police ignored the request, and that the officers only asked him about who had given him the marijuana.

To the contrary, during the evidentiary hearing, Officer Miles testified that, after Torode's arraignment and on the way back to the Oakland County Jail, Torode told him that he owed someone $100,000, that he had been fronted the marijuana that the officers had found at his house for $39,000, and that he paid his supplier $2,100 per pound. When Officer Miles was asked whether he had promised Torode any leniency, Officer Miles stated that he just advised Torode that, because he had already been arraigned and the prosecutor's office had already issued the warrants, the only thing he could do at this point would be to talk to a judge about some type of sentencing leniency.

A promise of leniency is one factor that may be considered in the evaluation of the voluntariness of a defendant's statements.[15] However, though Torode claims that he gave certain statements to the police as a result of a promise of leniency, he *denied* all the statements that he supposedly made as a result of the leniency. Thus, Torode's testimony and Officer Miles'

[12] *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997), citing *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996).

[13] *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

[14] See *Givans*, *supra* at 121.

[15] See *id*. at 120.

testimony directly conflicted. The trial court, as the fact finder, was entitled to decide that Officer Miles was more credible than Torode,[16] a determination to which we should defer.[17] The trial court found Officer Miles credible. Deferring to the trial court credibility determination, we conclude that the trial court's findings were not clearly erroneous and that it did not err in refusing to suppress Torode's statements.

IV. Felony-Firearm

A. Standard Of Review

Torode argues that the trial court erred in not dismissing the felony-firearm charge against him because the charge violated his constitutional right to bear arms. This Court reviews de novo questions of law regarding constitutional issues.[18]

B. The Right To Bear Arms

Const 1963, art 1, § 6 guarantees a right to bear arms.[19] "A person's right to bear arms under Const 1963, art 1, § 6 is not absolute" and has been found to be subject to "reasonable" statutory limitations "as part of the state's police power."[20] This Court has already held that a right to bear arms does not extend to possessing a firearm during the commission of a felony.[21] Accordingly, we conclude that Torode's right to bear arms under the Michigan Constitution was not violated by the felony-firearm charge.[22]

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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[16] *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001).

[17] *People v Catey*, 135 Mich App 714, 721; 356 NW2d 241 (1984).

[18] *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996).

[19] See *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998).

[20] *Id*.

[21] *People v Graham*, 125 Mich App 168, 172-173; 335 NW2d 658 (1983).

[22] To the extent that Torode also intends to argue that the evidence that he possessed the gun while committing a felony was insufficient, an issue he failed to present for appeal and brief adequately, we disagree. See MCR 7.212(C)(5); *Knapp*, *supra* at 374, n 4. Even though he put down the gun while opening the door, the gun was reasonably accessible to him while he was possessing the drugs, even before the police entered the house. See *People v Burgenmeyer*, 461 Mich 431, 438-440; 606 NW2d 645 (2000); *People v Becoats*, 181 Mich App 722, 726; 449 NW2d 687 (1989).